IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1941

No.....

HARTFORD FIRE INSURANCE COMPANY,
Petitioner,

vs.

MARTIN LEITHAUSER, AS ADMINISTRATOR OF THE ESTATE OF P. J. LEITHAUSER, DECEASED,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

STATEMENT OF THE CASE

Reference is made to the foregoing petition for Summary Statement of the Case, citation to Opinions Below, and statement as to Jurisdiction.

II

SPECIFICATIONS AND ASSIGNMENTS OF ERROR

1. The court below erred in reversing and in not affirming the judgment of the District Court dismissing respondent's petition.

2. The court below erred in holding that the claim of the respondent is not barred by the limitation of time for bringing suits contained in the policy.

3. The court below erred in holding that Section 11233

of the Ohio General Code was applicable and saved respondent's right to prosecute the present suit.

4. The court below erred in holding that the present suit is not barred by the adjudication upon the merits in the former case at law.

5. The court below erred in holding that the present suit is not barred by estoppel and election of remedies.

6. The court below erred in refusing to follow and apply applicable decisions of the Supreme Court of Ohio and of this court to all of the foregoing questions.

III

SUMMARY OF ARGUMENT

1. The decision of the court below is in conflict with decisions of the Ohio Supreme Court as to the effect of the time limitation for bringing suits contained in the policy.

2. The application of Section 11233 of the Ohio General Code made by the court below is in conflict with the Ohio decisions.

(a) Under the Ohio decisions this statute applies only where the first or prior action is dismissed otherwise than upon its merits, or where a judgment in favor of the plaintiff has been reversed.

(b) Under the Ohio decisions this statute does not apply except where the second suit is upon the same cause of action as that disposed of otherwise than upon the merits in the former suit.

(c) Under one Ohio decision, a decision of this court, and the clear weight of authority, this statute and statutes of like character apply only to statutory limitations and not to contractual limitations.

3. The decision of the court below is in conflict with the Ohio decisions which hold that the prior suit deter-

mined upon its merits is res adjudicata of the issues presented in the present suit.

4. Respondent is barred from recovery in the present suit by his election of remedies.

5. The judgment and opinion of the District Court are sound and correct and are in accord with the Ohio authorities, and the decisions of this court.

IV.

ARGUMENT

1.

The Decision of the Court Below is in Conflict with Decisions of the Ohio Supreme Court as to the Effect of the Time Limitation for Bringing Suits Contained in the Policy.

The policy in question contains the following provision (R. 22):

> "No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within twelve months next after the fire."

The fire occurred July 20, 1930 (R. 122). This suit was filed on March 30, 1936 (R. 1), nearly six years after the fire.

In Ohio the law is clearly settled by the highest court of the state that a limitation of time for bringing suit under a policy of insurance, of the type above quoted, is valid and enforceable, and bars recovery in any case not brought within the time specified.

The Supreme Court of Ohio in the case of *Appel vs. Insurance Co.*, 76 O. S. 52; 80 N. E. 955, decided this pre-

cise question and held in the syllabus (which states the law of Ohio) as follows:

> 1. "The parties to a contract of insurance may, by a provision inserted in the policy, lawfully limit the time within which suit may be brought thereon, provided the period of limitation fixed be not unreasonable.
>
> 2. "A provision in a policy of fire insurance that, 'no suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity until after full compliance by the insured with all the foregoing requirements, nor unless commenced within six months next after the fire,' is unambiguous, and in a suit on the policy commenced more than six months after the date of the fire, will be enforced in accordance with the plain meaning of its terms, where no extrinsic facts are alleged excusing delay in bringing the suit.
>
> 3. "Where a policy of fire insurance contains the provision that no suit or action shall be sustained thereon unless commenced within six months next after the fire, the period of limitation begins to run from the date of the fire, notwithstanding the policy also contains the provision 'that the loss shall not be payable until sixty days after proofs of loss have been received by the company'."

This case was expressly approved and followed in the later case of *Bartley vs. National Business Men's Association*, 109 O. S. 585; 143 N. E. 386. The Ohio Supreme Court has applied the same rule to a limitation contained in a bill of lading in *Pennsylvania Co. vs. Shearer*, 75 O. S. 249; 79 N. E. 431.

Respondent has not sought to reform this provision of the policy, nor does he claim that there has been any waiver of it by the company.

The rule as established in Ohio has been quite generally followed by the courts, including this court, which, in the leading case of *Riddlesbarger vs. Hartford Fire Insurance*

Co., 74 U. S. (Wall.) 386; 19 L. Ed. 259, speaking of such a limitation in a policy of insurance, said at page 392 of the opinion:

"We have no doubt of its validity."

See also *5 Joyce on Insurance*, 2nd Edition, Section 3181, and *7 Cooley Briefs on Insurance*, 2nd Edition, page 6781.

2.

The Application of Section 11233 of the Ohio General Code Made by the Court Below is in Conflict with the Ohio Decisions.

(a) Under the Ohio Decisions This Statute Applies Only Where the First or Prior Action is Dismissed Otherwise Than Upon Its Merits, or Where a Judgment in Favor of the Plaintiff Has Been Reversed.

The court below thought the present suit, although filed nearly six years after the fire, was saved as against the policy limitation by **Section 11233 of the Ohio General Code,** which in part provides as follows:

> "**Saving in case of reversal, etc.**—In an action commenced, or attempted to be commenced, if in due time a judgment for the plaintiff be reversed, or if the plaintiff fails otherwise than upon the merits, and the time limited for the commencement of such action at the date of reversal or failure has expired, the plaintiff, or if he dies and the cause of action survives, his representatives may commence a new action within one year after such date, * * *."

Under the Ohio decisions this section of the code would not apply nor save respondent's right to bring the present action. The language of the statute is plain. It applies in two instances only, to-wit:

(1) Where a judgment for the plaintiff has been reversed.

(2) Where the plaintiff fails otherwise than upon the merits.

Respondent does not fall within either of these classes. Respondent has never obtained a judgment and, therefore, a judgment in his favor has never been reversed.

In the first case, the law case, there was a judgment upon the merits in favor of petitioner. That judgment was affirmed by the court below (78 F. 2d 320), and *certiorari* was denied by this court (296 U. S. 645).

Nor does the respondent fall within the second class, since the prior case at law was determined, after a full trial, upon its merits, adversely to the respondent. In its opinion the court below (R. 160) made this statement:

> "In the first case Leithauser did not fail upon the merits within the meaning of Section 11233. The merits are embodied in the policy as reformed, but not in the policy as it was originally written."

This statement seems to underlie and be the very basis of the court's decision and shows how the court fell into error in applying Section 11233.

The first case brought to recover on the policy as written and fully tried and determined upon its merits, is not the same case as the present suit. The first case was entirely ended when this court denied respondent's petition for a writ of *certiorari*. The present suit is an entirely new, separate and distinct case from the first, and in it respondent sought reformation of the policy.

The merits of the prior case were embodied in the contract as written. The merits of the present suit involve the issue of reformation.

The error of the court below is in failing to see that in determining whether Section 11233 is applicable, and

whether it saves the present suit, the courts will **look only to the merits of the first or prior suit.** The merits of the present suit have nothing whatever to do with the question.

If, in the prior suit, respondent failed otherwise than upon the merits, then Section 11233 will save his rights here. On the other hand, if in the prior suit the issues were determined upon the merits adversely to respondent, then he is not helped out by this section of the Code.

The court below refused to follow the Ohio law which is clearly settled on this point.

> Siegfried vs. Railroad Co., 50 O. S. 294, 296; 34 N. E. 331.
>
> Frost vs. Blatz, 23 O. App. 40; 155 N. E. 158.
>
> 25 O. Jur. 580, Section 235.

See also the cases cited in the petition for rehearing in the court below (R. 172).

The leading case in Ohio is *Siegfried vs. Railroad Co. supra.* At page 296 of the opinion the court said:

> "The precise question in the case is, therefore, did the plaintiff **fail in his first action,** within the purview of the section of the statute above quoted. If he did not, the action below was barred; but if he did, it was not barred, for it was commenced the next day after the dismissal of the first action. We think the plaintiff, by the voluntary dismissal of his action, did not so fail; and his second action, the action below, was therefore barred."

In the case of *Frost vs. Blatz, supra,* at page 42, the court said:

> "It is sought, however, to prevent the bar of the statute by furnishing the court data showing that a prior action had been brought in July, 1922, which was dismissed on September 12, 1923. The court is not entitled to consider this information, but, even if considered, it does not show that the **prior action**

failed otherwise than on the merits, and that action would not, therefore, prolong the time for bringing the present suit."

In *25 O. Jur. 580, Section 235*, the law is stated as follows:

"However, the new action to be commenced within one year must be the **same** as the first action, and it must be shown that **prior action** failed otherwise than on its merits."

The test of whether **Section 11233** applies is whether the plaintiff failed upon the merits in the **first action.** Contrary to what the court below said, the merits of the second action have nothing whatever to do with it. The first action having failed upon its merits, **Section 11233** does not and cannot be applied so as to save respondent's rights in the present suit.

(b) Under the Ohio Decisions This Statute Does Not Apply Except Where the Second Suit is Upon the Same Cause of Action as That Disposed of Otherwise Than Upon the Merits in the Former Suit.

For a still further reason **Section 11233 of the Ohio General Code** is inapplicable. Under the Ohio decisions this code section applies only when the cause of action set forth in the second suit is the **same** as that determined otherwise than upon its merits in the first suit.

Is the present suit to reform the policy the **same cause of action** as that set forth in the first suit to recover upon the contract as written? If it is, the court below is in error because respondent's claim would clearly be barred by the adjudication in the former suit. The question of *res adjudicata,* however, will be hereinafter discussed.

To escape the rule of *res adjudicata,* the court below had to find, if it was to reverse the judgment of the District

Court, that the causes of action were not the same, and that was what the court did, as shown by the following quotation from the court's opinion (R. 160):

> "The judgment in the first Leithauser suit was not conclusive of the second. While the parties were the same in each case, **the causes of action were not.**"

In thus escaping from the rule of *res adjudicata,* the court below impaled itself upon the other horn of the dilemma, for under the Ohio decisions, as we have said, **Section 11233 of the General Code** will not apply unless the causes of action in the two cases are the same.

Larwill vs. Burke, 19 O. C. C. 449; affirmed 66 O. S. 683; 65 N. E. 1130.

Price vs. Kobacker Furniture Co., 25 O. App. 44; 158 N. E. 551.

Piscopo, Admr., vs. Railway Co., 19 O. C. C. (N. S.) 298.

25 O. Jur. 580, Section 235.

See also the Ohio authorities cited in the petition for rehearing filed in the court below (R. 167).

In the case of *Larwill vs. Burke, supra,* at page 472 of the opinion, the court said:

> "Under Section 4991 (now G. C. 11233), the new action to be commenced within one year after the party has failed in his first action otherwise than upon the merits, **must be the same as the first action.**"

In *Price vs. Kobacker Furniture Co., supra,* at page 47 of the opinion the court said:

> "The plaintiff had the right to commence a new action upon the **cause of action set out in the counterclaim** within one year from the date of the failure otherwise than upon the merits, provided the time limited for the commencement of an action had expired at the date of such failure."

In the case of *Piscopo, Admr. vs. Railway Co., supra,* the first paragraph of the syllabus states the law as follows:

> "1. Under Section 11233, General Code, if a plaintiff in an action for wrongful death fails otherwise than upon the merits, he may commence another action upon the **same cause** of action within one year thereafter."

A succinct statement of the Ohio law is contained in *25 O. Jur. 580,* Section 235, as follows:

> "However, the new action to be commenced within one year must be the **same** as the first action, and it must be shown that **prior action** failed otherwise than on its merits."

This court in the leading case of *Riddlesbarger vs. Hartford Fire Insurance Co.,* 74 U. S. (Wall.) 386; 19 L. Ed. 259, speaking of such a contractual limitation, at page 391 of the opinion said:

> "The action mentioned, which must be commenced within the twelve months, is the one which is prosecuted to judgment. The failure of a previous action from any cause cannot alter the case. The contract declares that an action shall not be sustained, unless such action, **not some previous action,** shall be commenced within the period designated. It makes no provision for any exception in the event of the failure of an action commenced, and the court cannot insert one without changing the contract."

Strangely enough the court below in *Brown vs. Erie Railroad Co.,* 176 Fed. 544, considered this same subject and held that the test of whether **Section 11233 of the General Code** was applicable depended upon whether the cause of action in the second suit was identical with that in the first. We quote the first paragraph of the syllabus as follows:

> "Under a statute of limitations, which permits the beginning of a new suit within a certain time after

> the failure of a former suit brought in due time on the **same cause of action** otherwise than on the merits, a second suit by an employe against a railroad company for a personal injury is for the **same cause of action** as a prior suit where the parties and the injury are the same, the facts pleaded are the same, and the negligence charged against the company is the same in legal effect, although it may be attributed to a different agent."

At page 547 of the opinion, written by Judge Severens, the court said:

> "The question we have before us is whether the petition in this suit presents the **same cause of action** as was presented in the former suit. Inasmuch as the same question is involved in cases where an amendment to a petition is made after the statute has barred an action, and in cases where a new action is brought under a statute allowing it, namely, whether there is an identity in the cause of action brought in by the amendment, or stated in the new action, decisions in either class of cases upon that subject are equally pertinent to the case before us."

Upon the same page the court also said:

> "The identity of the cause of action in the original petition with that of the amended petition was the test of the question whether the case could be proceeded with upon the amended petition against a plea in bar of the statute."

The court was correct in stating that the test here is the same as that applicable to a situation where a party seeks to amend his petition by adding a new or different cause of action from that set forth in the original pleading, and the authorities in Ohio are clear that such amendment, if not filed within the statutory limitation, is barred.

> Second National Bank of Cincinnati vs. American Bonding Co. of Baltimore, 93 O. S. 362, 371, 372; 113 N. E. 221.

Hills vs. Ludwig, 46 O. S. 373; 24 N. E. 596.
Commissioners of Delaware County vs. Andrews, 18 O. S. 50, 68-69.

The court below having determined and held that the present suit is not the same cause of action as that set forth in the former suit at law, determined upon its merits, it follows that **Section 11233** cannot apply, and the present suit is barred.

(c) Under One Ohio Decision, a Decision of This Court, and the Clear Weight of Authority, This Statute and Statutes of Like Character Apply Only to Statutory Limitations and Not to Contractual Limitations.

Does Section 11233 of the Ohio General Code apply to contractual limitations voluntarily entered into by the parties, or is it limited in its application to statutory periods of limitation?

In Ohio there are two decisions upon this question, both by intermediate appellate courts, and they reach opposite results.

In the earlier case of *Prudential Insurance Co. vs. Howle*, 19 O. C. C. 621; 10 Ohio Cir. Dec. 290, the Court of Appeals of Cuyahoga County expressly held that **Section 11233 of the General Code** (formerly Section 4991, R. S.) has no application to limitations created by contract. We quote the syllabus of the case:

> "A provision in a life insurance policy that no suit shall be maintained thereon unless such suit shall be commenced within six months next after the decease of the assured, is valid.
>
> "Sec. 4991, R. S. (General Code 11233) has no application to limitations created by contract, and hence has no application to this case."

In *Cortesi vs. Firemen's Fund Insurance Co.*, 5 O. App. 109; 27 Ohio Cir. Dec. 100, the Court of Appeals for Mahoning County, Judge Pollock vigorously dissenting, held as shown by the syllabus as follows:

> "A clause which shortens the statute of limitations, as to the time for bringing suit on the contract in which said contract is incorporated, can not be enforced in the face of the provision of Section 11233, having reference to the time within which suit may be brought in cases **which have failed otherwise than on the merits.**"

A motion to certify was denied by the Supreme Court, but this denial is not any indication that the Supreme Court approved the holding of the lower court. *Village of Brewster vs. Hill*, 128 O. S. 343, 352-53; 190 N. E. 766. See also *West vs. A. T. & T. Co.*, (6th Cir.) 108 F. 2d 347, 350; rev. on other grounds 311 U. S. 223.

In the case of *Village of Brewster et al. vs. Hill, supra*, on pages 352 and 353 of 128 O. S., the Supreme Court of Ohio said:

> "We have heretofore announced that, in cases knocking at our door for certification, the refusal of a motion to certify, even if the same legal question is decisively involved, does not furnish an adjudication of the question by this court as an established precedent for future cases."

In the case of *West et al. vs. American Telephone & Telegraph Co.*, 108 Fed. (2d) 347, the court below, speaking through Judge Allen, an Ohio lawyer, on page 350, said:

> "A motion to certify was made in the Supreme Court of Ohio, and overruled. This may well have been because that court did not deem the case to be of great general and public interest. Ohio Constitution, Art. IV, Sec. 2. The settled rule in Ohio is that the Supreme Court, by denial of motion to certify the record, lays down no law. It not infrequently

> makes pronouncements counter to those of Circuit Courts of Appeals whose judgments it has refused to certify, on the same questions covered by those judgments. *Village of Brewster vs. Hill,* 128 Ohio St. 343, 353; 190 N. E. 766."

There has been no decision by the Ohio Supreme Court upon this question, but the clear weight of authority in other jurisdictions is in accord with the rule of the *Howle* case, rather than the *Cortesi* case.

This is shown by the collection of cases in the annotation in *23 A. L. R.* at page 98, where the annotator says:

> "In all but a few jurisdictions the rule is that the provisions of a general statute of limitations extending the time of the running thereof, or fixing the time when an action shall be deemed to be commenced, do not apply to a limitation period prescribed in a policy of insurance."

The rule in the *Howle* case is also the same as that announced by this court in the leading case of *Riddlesbarger vs. Hartford Fire Insurance Co.,* 74 U. S. (Wall.) 386; 19 L. Ed. 259. At page 391 of the opinion this court said:

> "The statute of Missouri, which allows a party who 'suffers a nonsuit' in an action to bring a new action for the same cause within one year afterwards, does not affect the rights of the parties in this case. In the first place, the statute only applies to cases of involuntary nonsuit, not to cases where the plaintiff of his own motion dismisses the action. It was only intended to cover cases of accidental miscarriage, as from defect in the proofs, or in the parties or pleadings, and like particulars. **In the second place, the rights of the parties flow from the contract. That relieves them from the general limitations of the statute, and, as a consequence, from its exceptions also.**"

The court below considered the *Cortesi* case, *supra,* at length (R. 159) and seemed to base its decision largely

upon that case. Aside from the fact, however, that the decision was by a divided court and in conflict with the earlier *Howle* case, the *Cortesi* case deals only with the question as to whether Section 11233 is applicable to contractual limitations, as well as to statutory limitations.

It is not an authority for anything else and the facts are utterly different from the facts in the case at bar.

In the *Cortesi* case, the prior suit, instead of having been determined upon its merits, was **dismissed for want of prosecution** (page 110 of the opinion reported in 5 O. App.).

A dismissal for want of prosecution under the Ohio law is not a dismissal upon the merits. It is a dismissal otherwise than upon the merits **(G. C. Section 11586).**

Even if we concede for purposes of argument only, that the *Cortesi* case is a controlling Ohio decision on the subject of whether Section 11233 applies equally and alike to contractual limitations voluntarily entered into by the parties and limitations fixed by statute, yet the case is not pertinent nor of any authoritative value on the points hereinabove covered under Divisions (a) and (b).

Apparently the court below entirely overlooked this distinction and gave to the *Cortesi* case an emphasis which it does not deserve.

For the foregoing reasons, it is respectfully submitted that the court below was in error and did not follow the settled law of Ohio, in holding that Section 11233 of the General Code had application and saved respondent's rights as against the limitation of time for bringing suits contained in the policy.

3.

The Decision of the Court Below is in Conflict with the Ohio Decisions Which Hold That the Prior Suit Determined Upon Its Merits is Res Adjudicata of the Issues Presented in the Present Suit.

When respondent's decedent filed the first suit to recover on this policy, he elected to base his claim on one cause of action, namely, to recover upon the contract as written. He did not also include a second cause of action for reformation, as he would have had a perfect right to do under the Ohio law. **General Code Section 11306.** *Globe Insurance Co. vs. Boyle,* 21 O. S. 119.

Under the Ohio law it was the duty of the respondent's decedent to plead in that first petition all the grounds of recovery available to him. The Ohio courts do not encourage the splitting up of a claim for relief, and they hold that a party is bound not only by what was pleaded and determined in a given case, but also he is bound as to every claim which might or could have been pleaded and determined in that case.

Covington & Cincinnati Bridge Co. vs. Sargent, 27 O. S. 233.

Strangward vs. American Brass Bedstead Co., 82 O. S. 121; 91 N. E. 988.

Clark vs. Baranowski, 111 O. S. 436, 440; 145 N. E. 760.

Bolles vs. Toledo Trust Co., 136 O. S. 517, 520; 27 N. E. 2d 145.

Paragraph 1 of the syllabus in the case of *Covington & Cincinnati Bridge Co. vs. Sargent, supra,* reads as follows:

> "In a judicial proceeding in a court of record, where a party is called upon to make good his cause

> of action or establish his defense, he must do so by all the proper means within his control, and if he fails in that respect, purposely or negligently, he will not afterward be permitted to deny the correctness of the determination, nor to relitigate the same matters between the same parties."

In *Clark vs. Baranowski, supra,* the court at page 440 said:

> "In cases where there is identity of parties and subject-matter, it is the settled law of this state that a former judgment is conclusive between the parties, not only as to matters actually determined but also as to any other matters which could, under the rules of practice and procedure, have been determined."

This court in *Baltimore Steamship Co. vs. Phillips,* 274 U. S. 316; 71 L. Ed. 1069, has held to the same effect (opinion, page 320):

> "The same general doctrine is stated in *Stark vs. Starr,* 94 U. S. 477, 485, that 'a party seeking to enforce a claim, legal or equitable, must present to the court either by the pleadings or proofs, or both, all the grounds upon which he expects a judgment in his favor. He is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible.' And see also *Werlein vs. New Orleans,* 177 U. S. 390, 398-400."

Applying the principles announced in these controlling cases, it is apparent that respondent is barred from recovering in the present case by the adjudication in the former case. The defense of *res adjudicata* was pleaded in petitioner's answer, and the pleadings, evidence and judgment in the former case were received in evidence and were before the court below (R. 125).

The parties and subject-matter are identical and respondent is bound by the adjudication in the former case to the same extent as if he had actually pleaded in the former suit a claim for reformation. That is true because under the rules of practice and procedure in Ohio such a cause of action could have been pleaded and determined in the former action.

The District Court in its opinion held that the respondent was estopped to maintain the present suit by the principle of former adjudication (R. 90). The District Court said:

> "The procedure in Ohio in 1931 when the first petition was filed permitted the plaintiff to insert a cause of action seeking reformation of the contract. This he failed to do." (R. 90.)

4.

Respondent is Barred from Recovery in the Present Suit by His Election of Remedies.

At the time respondent filed his petition in the first case and at the time the action was removed to the federal court, the law was clearly settled that a recovery could not be had in an action at law upon the policy as written, and that the remedy, if any, was by a suit in equity to reform the policy. The law to this effect had long been established by the decisions of this court and of the Circuit Court of Appeals for the Sixth Circuit. Some of the cases are as follows:

Northern Assurance Co. vs. Grandview Bldg. Assn., 183 U. S. 308; 46 L. Ed. 212.

Lumber Underwriters of New York vs. Rife, 237 U. S. 605; 59 L. Ed. 1140.

Sun Insurance Office vs. Scott, 284 U. S. 177; 75 L. Ed. 55.

Hartford Fire Insurance Co. vs. Nance, 6th Cir., 12 F. 2d 575.

Hartford Fire Insurance Co. vs. Jones, 6th Cir., 15 F. 2d 1.

Forkner vs. Twin City Fire Ins. Co., 6th Cir., 19 F. 2d 419.

It must be presumed that respondent knew the law established by these cases. They warned him that if he had any remedy it was in equity, and that he was barred from any relief in an action at law.

Notwithstanding this knowledge, respondent prosecuted with great pertinacity his action at law. The District judge, after a full trial, held against him and even warned him that if he had any remedy it was in equity (R. 5). Respondent, however, prosecuted error to the Circuit Court of Appeals where the judgment of the District Court was in all respects affirmed (78 F. 2d 320).

Respondent then filed a motion in the court below to recall the mandate and for leave to amend his petition so as to include a claim for reformation (R. 141), which motion was denied (R. 142). Respondent then filed a petition for *certiorari* in this court which was denied (296 U. S. 645).

Finally, respondent filed in the District Court in the same cause, a motion for leave to file an amended petition, setting up a claim for the reformation of the policy, which motion was denied (R. 94; Finding No. 10).

All of these proceedings covered a period of several years, and although doomed to failure from the very outset, they were, nevertheless, prosecuted vigorously by respondent and to the very large expense of the petitioner.

Respondent did not misconceive his remedy; he ignored his remedy and elected to gamble his own theory of the law

against the well established pronouncements to the contrary by the courts.

The elements of a valid estoppel are present: knowledge on the part of the respondent, actual or imputed, that an action at law afforded him no remedy; knowledge that his stubborn prosecution of the litigation through the courts was causing petitioner huge expense and detriment, and a persistent continuance of the action at law until more than five years after the occurrence of the fire.

Certainly there must be an end to litigation. Respondent is estopped by his election of remedies.

Warner vs. Godfrey, 186 U. S. 365; 46 L. Ed. 1203.

Healey Ice Machinery Co. vs. Green, 184 Fed. 515, 520.

Thomas vs. United Firemen's Ins. Co., 108 Ill. App. 278.

Leaksville Light & Power Co. vs. Georgia Casualty Co., 193 N. C. 618; 137 S. E. 817.

Royal Insurance Co. vs. Stewart, 190 Ind. 444; 129 N. E. 853.

Barnett Bros. vs. Western Insurance Co., 143 Ark. 358; 220 S. W. 465.

Steinbach vs. Relief Fire Insurance Co., 12 Hun. (N. Y.) 640; affirmed 77 N. Y. 498.

In the case of *Warner vs. Godfrey, supra*, the court at page 378 of the opinion said:

> "It would be highly inequitable to permit a litigant to press with the greatest pertinacity for years unfounded demands for specific and general relief, however much confidence he may have had in such charges, necessitating large expenditures by the defendants to make a proper defense thereto, and then, after the submission of the cause, when the grounds of relief actually asserted were found to be wholly

> without merit, to allow averments to be made by way of amendment, constituting a new and substantive ground of relief. This is especially applicable when the facts upon which such amendment rests were known at the incipiency of the litigation and the character of the relief was such as called for promptness in asserting a right thereto. Cogency is added to these considerations when it is borne in mind that if the facts had been embodied in the bill, so as to have allowed issue to be taken thereon, they might have been fully met and disproved by the defendants."

The courts of Ohio, so far as we have been able to determine, have not passed upon this precise question, but they have passed upon a question somewhat analogous.

In *Lee et al. vs. Thoma*, 1 O. App. 384; affirmed without opinion 91 O. S. 444; 110 N. E. 1062, the court held in the syllabus as follows:

> "An action for specific performance is a bar to a subsequent action for damages alleged to have been sustained through failure of the defendant to carry out the contract which forms the basis of the first suit."

Likewise, in *Zutterling vs. Drake*, 10 O. C. C. (N.S.) 167; affirmed without opinion 82 O. S. 410; 92 N. E. 1113, the court held (Syl. 1):

> "An election between remedies can be made but once, and where a plaintiff has chosen to ask for specific performance he can not subsequently maintain a suit for damages."

In *Mignery vs. Olmstead, Admr.*, 91 O. S. 416, 417; 110 N. E. 1063, the Supreme Court held that (page 417):

> "Plaintiff in error having selected his remedy when he prepared and presented his claim against the estate of James Mignery, deceased, he could not maintain an action upon the instrument in question for the land."

In *Shepherd vs. Payser*, 26 O. Law Abs. 669, the court at page 670 held:

> "Shepherd elected to pursue his legal remedy, reduced said note to judgment, and issued execution thereon. We hold that such conduct evidenced a conclusive act of election, which thereafter precluded Shepherd from resorting to the equitable remedy which he might have chosen had he so elected."

Finally, in *Frederickson vs. Nye et al.*, 110 O. S. 459; 144 N. E. 299, in applying the doctrine of election of remedies, the Supreme Court of Ohio held in the first paragraph of the syllabus as follows:

> "An action by a vendor asking for a money judgment based on fraud in the transfer of property, averring title in the vendee, is an action at law in deceit, and is inconsistent with an action in equity averring equitable title in the vendor and seeking to establish a constructive trust *ex maleficio* in favor of the vendor relying upon the same fraud as set out in the law action."

In the absence of any Ohio decision on the precise question here under consideration, the foregoing authorities dealing with analogous situations are entitled to considerable weight, and from them it may be well argued that the Ohio courts, when the question is presented, would hold that respondent under such facts as we have here would be barred by his election of remedies.

We will not extend the length of this brief by quoting from the other decisions which we have cited on this point, but will only say that they hold that a party, with full knowledge of his rights, who brings an action to recover on a policy of insurance as it is written and loses in that case, may not thereafter maintain a suit in equity to reform the contract and recover upon it as, if and when reformed. He is bound by his election of remedies.

The case of *Northern Assurance Co. vs. Grandview Building Assn.*, 203 U. S. 106; 51 L. Ed. 109, relied upon by respondent and cited in the opinion of the court below, is not in point, nor controlling for several reasons.

First, in the original action brought by *Grandview Building Assn. vs. Northern Assurance Company*, there was a judgment for the plaintiff in the District Court which was affirmed by the United States Circuit Court of Appeals for the Eighth Circuit. The Supreme Court reversed (183 U. S. 308; 46 L. Ed. 213). As the federal practice then stood, the plaintiff was entitled to a new trial subject to the law of the case as announced by the Supreme Court. Under the Nebraska law plaintiff was free to begin a new action under the five-year statute of limitations at that time in force (102 N. W. 246, 249; 73 Nebr. 149).

The situation in the case at bar was utterly different—in fact exactly opposite. Here Leithauser has never had a judgment. The decision of the District Court in the first case was against him. That judgment was affirmed by the court below and *certiorari* was denied by this court. In other words, there was a final judgment upon the merits in favor of petitioner and against Leithauser.

The Ohio saving statute **(G. C. Section 11233)** therefore, could not help the respondent or justify the filing of a second suit after the expiration of the period of time permitted by the policy.

A second distinction is that at the time the *Grandview Building Association* case was filed, the law of the State of Nebraska was directly contrary to the law of the State of Ohio on the question as to the validity and binding character of a contractual limitation for bringing suits on policies of fire insurance.

At the time the *Grandview Building Association* case was filed, the law of Nebraska was that such a contractual

limitation was void if it shortened the time permitted by the state statute for the bringing of a suit on a contract.

Miller vs. State Insurance Co., (Nebr.) 74 N. W. 416.

Insurance Co. vs. Drennan, (Nebr.) 77 N. W. 67.

Northern Assurance Co. vs. Grandview Bldg. Assn., (Nebr.) 102 N. W. 246.

In Ohio, as we have seen, the decisions of the Supreme Court uphold as valid and binding the stipulation in the contract of insurance fixing the time within which suits must be brought, even though the period of time so fixed is shorter than the period of limitations fixed by statute for bringing suits on written contracts (*Appel vs. Cooper Insurance Co.*, 76 O. S. 52; 80 N. E. 955).

In Nebraska the contractual limitation in the policy fixing the time for bringing suits was null and void, and the second suit was filed within the five years permitted by the statute of limitations in Nebraska for bringing suits on written contracts. In Ohio the contractual limitation is binding, notwithstanding the statutory limitation.

A final distinction is that at the time the first *Grandview Building Association* case was filed the law of Nebraska and the law of the Eighth Circuit upheld the right of the plaintiff to recover at law in an action upon the contract. *Home Fire Insurance Co. vs. Wood*, (Nebr.) 69 N. W. 941. *Insurance Co. vs. Norwood*, 69 Fed. 71. The law at that time in this court favored recovery. *Insurance Co. vs. Wilkinson*, 13 Wall. 23; 20 L. Ed. 617.

It being settled by the courts that plaintiff, Grandview Building Association, had a remedy at law, the plaintiff could not sue in equity. He had no choice. As this court

said at page 108 of the opinion (203 U. S. 106), referring to the law as it then stood:

> "So long as those decisions stood, the plaintiff had no choice."

In the case at bar, the situation was exactly opposite. At the time respondent filed his petition in the first case and at the time the case was removed to the federal court, the law as established in the Sixth Circuit and by decisions of this court clearly indicated to respondent that he had no remedy at law, but that his remedy, if any, was in equity.

The *Northern Assurance Company* case, therefore, is not in point and it does not support the decision of the court below.

5

The Judgment and Opinion of the District Court Are Sound and Correct and Are in Accord With the Ohio Authorities, and the Decisions of This Court.

The district judge who is an Ohio lawyer and is familiar with the Ohio law, decided this case in favor of the petitioner, and in accordance with the Ohio law. Judge Kloeb found that the petitioner was not entitled to recover for three reasons which he stated in his opinion as follows (R. 87):

> "(1) The petition was not filed within the time fixed by the policy itself for instituting such an action.
>
> "(2) All issues might or could have been adjudicated in the same claim for relief, which was Case No. 3737 at Law, and which was fully tried upon its merits and resulted in a judgment for the defendant.
>
> "(3) Plaintiff is estopped under the principles of former adjudication and election of remedies to maintain this suit."

It is submitted that the judgment of the District Court is sound and correct, and that the judgment of the court below, reversing that judgment, is in conflict upon the questions herein discussed, with the decisions of the Ohio courts and the law as generally established by this and other courts.

It is, therefore, submitted that writ of *certiorari* should be allowed as prayed for, and that the judgment of the court below should be reversed.

Respectfully submitted,

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